



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 9, 2012

Mr. W. Lee Auvenshine
Assistant County & District Attorney
Ellis County
109 South Jackson
Waxahachie, Texas 75165

OR2012-06869

Dear Mr. Auvenshine:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 452996.

Four Ellis County Commissioners and an Ellis County Judge (collectively, the "commissioners court") received identical requests from the same requestor for ten categories of information, including documents, e-mails, and phone records sent or received by any members of the commissioners court concerning specified properties and specified individuals from October 3, 2011, to the date of the request. You state you have released some of the requested information to the requestor. You claim the submitted information is exempted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant requests because it does not pertain to the specified properties or individuals or because it was created after the commissioners court received the requests for information. This ruling does not address the public availability of non-responsive information, and the commissioners court is not required to release non-responsive information in response to the instant requests.

Next, we address the requestor's assertion that the commissioners court failed to comply with section 552.301(b) of the Government Code by not seeking a ruling from this office within ten business days of receiving an earlier written request for the same information. *See id.* § 552.301(b). The requestor states, and provides documentation showing, he previously

submitted a request identical to the instant requests to the Ellis County Clerk (the “county clerk”) on January 10, 2012, and the county clerk acknowledged receipt of the request on January 17, 2012. The requestor states the county clerk informed him via telephone that she did not have access to the requested documents of the commissioners court’s members, and she did not forward the request to the members of the commissioners court. The requestor states after receiving this response from the county clerk, he submitted identical requests for information directly to each member of the commissioners court on February 17, 2012.

We note a written request made through e-mail must be sent to the governmental body’s officer for public information, or the officer’s designee, in order to trigger the deadlines provided by the Act. *See id.* § 552.301(c). Section 552.201(b) of the Government Code provides that “[e]ach elected county officer is the officer for public information and the custodian, as defined by Section 201.003, Local Government Code, of the information created or received by that county officer’s office.” *Id.* § 552.201(b). Accordingly, each of the four Ellis County Commissioners and the Ellis County Judge at issue in the instant requests is the proper custodian of his or her own information. Furthermore, because the county clerk does not maintain the responsive documents and communications of the commissioners court members and is not the proper custodian of such information, the Act does not require the county clerk to respond to the requestor’s original e-mail communication for this information.

You inform us, and provide documentation showing, the commissioners court received the instant requests for information on February 17, 2012. Thus, the commissioners court’s ten-business-day deadline to request a ruling from this office was March 5, 2012. The envelopes in which the commissioners court sent its requests for a ruling to this office were postmarked March 5, 2012. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we find the commissioners court complied with section 552.301(b) of the Government Code in requesting a ruling from this office. Accordingly, we address the commissioners court’s arguments against disclosure of the submitted information.

Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Open Records Decision No. 452 at 4 (1986).* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ *See Open Records Decision No. 555 (1990); see also Open Records Decision No. 518 at 5 (1989)* (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See Open Records Decision No. 331 (1982).* Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See Open Records Decision No. 361 (1983).*

You state a petition seeking pre-suit depositions is currently pending in the 40th Judicial District Court of Ellis County, Texas, and those depositions relate to an investigation into whether the commissioners court violated the Texas Open Meetings Act in amending a deed restriction on one of the properties specified in the request. You further state the information at issue is related to the subject of the depositions because both concern the commissioners court’s actions regarding the deed restrictions for the properties at issue. Upon review, we conclude the commissioners court reasonably anticipated litigation on the date that it received the requests for information. Further, we find the information at issue is related to

¹In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see Open Records Decision No. 336 (1982)*; hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see Open Records Decision No. 346 (1982)*; and threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981).*

the anticipated litigation. Accordingly, the commissioners court may withhold the submitted information under section 552.103 of the Government Code.²

In reaching this conclusion, we assume that the opposing party in the pending litigation has not seen or had access to any of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information relating to pending litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/dls

Ref: ID# 452996

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²As our ruling is dispositive, we need not address your remaining argument against disclosure.